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Yong Choo Kiong v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05(SH)-317–7 OF 2022
HADHARIAH SYED ISMAIL, AZMAN ABDULLAH AND SM KOMATHY JJCA
18 MARCH 2024

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Criminal Law — Rape — Corroboration — Whether independent evidence was lacking to corroborate girl's allegation that employer had raped her — Whether testimonies of witnesses who merely repeated what girl had told them was not corroboration — Whether medical evidence that girl had suffered freshly-torn hymen and abrasion in vagina was also not corroboration as doctors agreed that consensual sex and masturbation could also have caused the injuries — Whether girl's behaviour after alleged rape did not resemble behaviour of person who had been raped — Whether girl's initial complaint to others was not that she had been raped but that employer had sexually harassed her and not treated her fairly — Whether material inconsistencies and contradictions in girl's testimony created reasonable doubt in prosecution's case

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Criminal Procedure — Witness — Protected witness — Criminal Procedure Code ('CPC'), s 265A — Whether trial judge erred in invoking s 265A CPC to allow alleged rape victim to testify from behind screen unseen by accused and his counsel — Whether statutory pre-requisites for invocation of s 265A procedure had not been met — Whether procedure had compromised accused's right to fair trial as his counsel could not observe witness's demeanour and therefore could not effectively cross-examine her — Whether there was no reason not to disclose witness's identity as accused knew who she was and there was no evidence witness's life might be endangered if her identity was disclosed — Whether trial judge's failure to consider accused's cautioned statement to police was serious and incurable breach of s 182A CPC

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The appellant, who was at the material time a state assemblyman and member of the Perak State Executive Council, was convicted and sentenced to 13 years jail and two strokes of the cane by the High Court for raping his then 23 year old Indonesian maid ('PW15') in an upstairs bedroom of his double-storey house in Ipoh, Perak, between 8.15pm and 9.15pm on 7 July 2019. The prosecution's case was that the rape took place when the appellant was alone with PW15 after his wife, DW2, drove out with her son to buy dinner from a fast-food outlet nearby. PW15 testified that she was ironing clothes at the time when the appellant came into the room, pulled her on to the bed, pinned her

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down with his hands and raped her. When the appellant let go of her hands, she managed to run away and lock herself in the toilet where she cleaned herself. Thereafter, PW15 said, she continued with her ironing. When she stepped on something sticky in the room and thought it was the appellant's semen, she went downstairs to get a mop to clean the affected area and then took the mop back down to have it washed. By that time, DW2 had returned home but PW15 did not tell her anything about what had happened. The following day, PW15 telephoned the Indonesian Embassy (from a landline which was not the appellant's house number) and told an officer there ('PW3') about the alleged sexual assault. She was advised to lodge a police report or to come to the Embassy. PW15 said she left the house and got the help of a passing motorist ('PW16') to send her to the police station to lodge a report. Thereafter, she went to a hospital where two doctors — PW5 and PW6 — examined her and found that she had a freshly-torn hymen and an abrasion in her vagina, but no other bruises or injuries on her body. Police investigations did not find any semen or DNA belonging to the appellant on PW15's clothes or on any other items that the police had seized from the appellant's home in connection with their investigations. At the trial, the appellant contended that the rape allegation was fabricated by PW15 so that she could return to Indonesia because she was not happy working for the family. The appellant also claimed that at all material times, he was never alone with PW15 in the house as his friend (PW22) was visiting him at the time. To corroborate his testimony, the appellant relied upon DW2's evidence as well as his cautioned statement to the police given under s 112 of the Criminal Procedure Code ('the CPC') after his arrest. The trial judge disbelieved the appellant, rejected his defence as an afterthought and bare denial, found PW15 to be a credible witness and ruled that the prosecution had proven its case beyond reasonable doubt. In particular, the judge found from the CCTV footage taken from the guardhouse in the area that PW22 had left the appellant's house before DW2 went out to buy dinner and therefore the appellant had the opportunity to rape PW15. One of the appellant's complaints in his instant appeal against conviction and sentence was the trial judge's decision to invoke s 265A of the CPC to allow PW15 and PW16 to testify at the trial from behind a screen, out of sight of the appellant and his counsel, so as to protect their identities. The appellant argued that the procedure was unnecessary because he already knew who PW15 was and there was no evidence to show that the lives of PW15 and PW16 might be endangered if their identities were disclosed. The appellant contended that the procedure had, instead, denied him of a fair trial as his counsel could not observe PW15's and PW16's demeanour when they were testifying and this had prevented counsel from effectively cross-examining them.

Held, by majority, dismissing the appeal against conviction, allowing the appeal against sentence and reducing the appellant's jail term to eight years:

(1) (**per Azman Abdullah JCA, majority**) The invocation of s 265A of the

CPC for PW15 and PW16 was within the discretionary power of the trial judge and this court found that he did not err in invoking that section. Although the demeanour of a witness when testifying was important in assessing his or her credibility, it was the court's duty, and not the litigant's, to make an evaluation on the credibility of a witness. As to the appellant's contention that s 265A was unconstitutional, this was a question that was only fit for the Federal Court to decide by virtue of art 128(2) of the Federal Constitution. The appellant should have followed the proper procedure for such issue to be referred to the Federal Court for determination (see paras 19 & 21).

(2) (**per Azman Abdullah JCA, majority**) The trial judge did not err in finding that PW15 was a credible witness. Having heard and considered all the evidence tendered at the trial and having had the audio-visual advantage of hearing and observing the demeanour of the witnesses, the trial judge was clearly entitled to make findings with regard to the credibility of the witnesses. An appellate court should be slow to interfere with such findings unless it was shown that they were perverse and against all available evidence. In the present case, there was no reason to disturb the findings of the trial judge (see para 22).

(3) (**per Azman Abdullah JCA, majority**) Even though there were shortfalls and inconsistencies in PW15's evidence, there was no reason for her to make up stories. The medical evidence from PW5 and PW6 corroborated PW15's evidence and there was no material contradiction in her evidence to compel the court to accept the appellant's version. The CCTV footage showed that PW22 had exited Meru Desa Park before DW2 exited the residential area at 8:48:37pm and returned at 9:01:18pm. Therefore, the appellant was alone with PW15 in the house for about 13 minutes during which time it was possible for the rape to have taken place. In the absence of any evidence that the house was broken into or that PW15 had had sexual intercourse with another man, it was an inevitable conclusion that PW15's freshly-torn hymen and abrasion on the vagina was caused by the appellant (see paras 23–25).

(4) (**per Azman Abdullah JCA, majority**) This court was unable to agree with the appellant that the police investigation into the case was shoddy and incomplete. The investigation was satisfactorily done and the appellant was not prejudiced. The points raised by the appellant in this regard were not material to warrant appellate interference (see paras 26 & 28).

(5) (**per Azman Abdullah JCA, majority**) Although the trial judge in his grounds of judgment made no mention of the appellant's cautioned statement to the police following his arrest, the judge had analysed the contents of the cautioned statement. This court also found that the said cautioned statement, the defence during the prosecution's case, the

witness's statement and the appellant's evidence during the defence's stage at trial, all contained the same narrative. Thus it could not be said that the trial judge's failure to make mention of the cautioned statement in his grounds of judgment was fatal and had vitiated the appellant's conviction as the cautioned statement added nothing further to the appellant's evidence in court. The High Court's grounds of judgment clearly showed that the trial judge had considered all the defences of the appellant including the facts mentioned in his cautioned statement (see paras 31 & 33).

(6) (**per Azman Abdullah JCA, majority**) The trial judge found the defence to be an afterthought because of defence counsel's failure to put his case to PW22 when cross-examining him. Although the appellant had stated his version of events at a very early stage ie, in his cautioned statement, but in order to prove that he was with PW22 at the time of the offence, such facts should have been asked to PW22 so that PW22 could have confirmed it. The defence was also found to be an afterthought on the appellant's allegation that the charge against him was the result of a conspiracy between PW15, PW16 and his political enemies. The trial judge did not err in finding that the appellant's defence was an afterthought and a bare denial (see paras 34–36).

(7) (**per SM Komathy JCA, dissenting**) An accused person in a criminal trial was entitled to confront his accuser to challenge the accuser's evidence by way of cross-examination. Being able to see the face of a witness was the most important factor in cross-examination. As such, the court's discretion under s 265A of the CPC to allow a witness to testify anonymously in order to conceal his identity for his safety should be exercised sparingly and with great caution to ensure that a fair hearing was achieved. A witness protection order ought to be made only where the preconditions set out in s 265A had been met (see para 67).

(8) (**per SM Komathy JCA, dissenting**) In the instant case, the trial judge erred in invoking s 265A of the CPC as the statutory pre-requisites and the necessity for doing so had not been made out. The mere fact that a witness refused to testify and was reluctant to have his identity disclosed was ipso facto insufficient for a protection order to be made. There must be credible evidence that the refusal to testify was based on a well founded, real and genuine fear which justified the identity of the victim to be protected from disclosure to protect his or her safety. There was no evidence that PW15 had reason to fear for her safety since she was at the material time in the care and protective custody of the Indonesian Embassy. Neither was there any evidence to show that the appellant or someone on his behalf had threatened PW15 in any way. Moreover, and crucially, PW's identity was already known to the appellant. And as for PW16, he was not even a material witness as all that he did was to drive

PW15 to the police station. It was difficult to fathom why a protection order was necessary in his case. In the result, the appellant's conviction should be quashed (see paras 69–71 & 72).

(9) (**per SM Komathy JCA, dissenting**) There were material inconsistencies and discrepancies in PW15's evidence which rendered her evidence far from being 'unusually convincing', as found by the trial judge. Her testimony alone, without further corroborative evidence implicating the appellant, was insufficient to ground a conviction: (a) her behaviour immediately after the alleged rape did not resemble the conduct of a genuine rape victim. After she had cleaned herself in the bathroom, she went back to her ironing. To clean up what she thought was the appellant's semen on the bedroom floor, she went downstairs twice — once, to get the mop and then to put it back — knowing that the appellant could be downstairs and might rape her again. Her suspiciously calm conduct, especially in erasing the evidence of sexual intercourse, as if nothing had happened, was difficult to fathom. One would have expected her to be traumatised and in a state of shock or distress. Instead, she continued with her household chores in a cool, collected and indifferent manner; (b) PW15's allegation that the appellant was aggressive and had forcefully held her hands when he raped her was inconsistent with the medical evidence, which did not show any injuries on her body; (c) after receiving the phone call from PW15, PW3 made a police report in which she said that PW15 had complained of being 'sexually harassed' by her employer. On the same day, the witness from the maid agency, PW12, lodged a police report saying that the Indonesian Embassy had informed him that PW15 had complained of 'not being treated fairly' by her employer. PW15 had never proffered an explanation for these two pieces of contemporary evidence which were inconsistent with the allegation of rape; (d) PW15 alleged that she called the Indonesian Embassy from the appellant's house. But the landline number (05–5497131) from which PW3 received the call was not the telephone number of the appellant's house. Why did PW15 not tell the truth on an issue like this? Were there hidden or unseen hands behind this incident? The prosecution could have easily traced the identity of the owner of the landline number; (e) the absence of the appellant's semen and DNA on all of the items seized by the police was inconsistent with PW15's narrative. The forensic witness, PW14, agreed under cross-examination that even if the mop had been washed, semen stains could still remain on the mop; and (f) it was incredulous that the appellant would have been so desperate and reckless to rape PW15 knowing that his wife and son could return home any time from the fast-food outlet which was just a ten to 13 minute drive away. And, more importantly, knowing that there was a high likelihood of PW15 reporting the incident to his wife (see paras 82–87).

(10) (**per SM Komathy JCA, dissenting**) It could not be said that the medical evidence of a fresh tear in PW15's hymen and an abrasion in her vagina corroborated the rape allegation. The doctors (PW5 and PW6) who examined PW15 agreed under cross-examination that the injuries were also consistent with consensual sex and masturbation and that masturbation and self-pleasure with the finger could have caused the tear in the hymen apart from sexual intercourse. Both PW5 and PW6 could not conclusively say that the hymen tear and abrasion were because of penile penetration (see para 89). A B

(11) (**per SM Komathy JCA, dissenting**) Although by reason of s 159 of the Evidence Act 1950, PW15's complaints to PW3 and to PW16 and the lodging of her police report were technically corroboration of her evidence, they were not corroboration by independent evidence in the *Baskerville* sense (ie, as explained in *R v Baskerville* [1916] 2 KB 658) as all the complaints had originated from PW15 herself. Her complaints to PW3 and PW16 and the lodging of the police report was suspect and had little additional evidential value. If PW15's evidence was not unusually convincing, the fact that she had repeated it several times could not add much weight to it. In fact, at the first opportunity, PW15's complaint was not of rape but of sexual harassment and of not being treated well by her employer (see paras 92–93). C D E

(12) (**per SM Komathy JCA, dissenting**) The trial judge erred in finding that PW15 was 'unusually convincing' and that there was corroboration of her evidence. The discrepancies and contradictions in PW15's testimony raised several serious doubts as to the veracity of the allegation made by her and sufficed to create a reasonable doubt in the prosecution's case (see paras 95–96). F

(13) (**per SM Komathy JCA, dissenting**) Based on this court's decision in *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282 (which was upheld by the Federal Court) and a recent decision of the Federal Court on review in *Sathya Vello v Public Prosecutor* [2022] 4 MLJ 111, the trial court's failure to consider the appellant's cautioned statement, even if it was consistent and in accord with his testimony in court, was a serious breach of s 182A of the CPC which could not be cured by the proviso to s 92 of the Courts of Judicature Act 1964 (see paras 102–105). G H

(14) (**per SM Komathy JCA, dissenting**) The mere fact that the appellant was alone with PW15 in the house did not mean that he had raped her. This was a case that boiled down to PW15's word against the appellant's and the latter's version raised grave doubts about the former's allegation of rape. The appellant's conviction was therefore unsafe and unsatisfactory and therefore both the conviction and sentence had to be set aside (see paras 106–107). I

[Bahasa Malaysia summary

Perayu, yang merupakan Ahli Dewan Undangan Negeri (ADUN) dan Ahli Majlis Mesyuarat Kerajaan Negeri Perak ketika kejadian, didapati bersalah dan dijatuhkan hukuman penjara 13 tahun dan dua sebatan oleh Mahkamah Tinggi kerana merogol pembantu rumahnya yang ketika itu berusia 23 tahun ('SP15') di bilik tidur tingkat atas rumah dua tingkatnya di Ipoh, Perak, di antara jam 8.15 malam hingga 9.15 malam pada 7 Julai 2019. Menurut kes pendakwaan, kejadian rogol berlaku apabila perayu bersendirian dengan SP15 selepas isterinya, SD2, keluar bersama anaknya untuk membeli makan malam di sebuah kedai makanan segera berhampiran. SP15 memberi keterangan bahawa ketika dia sedang menggosok pakaian, perayu masuk ke dalam bilik, menariknya ke atas katil, menahan tangannya dan kemudian merogolnya. Apabila perayu melepaskan tangannya, dia berjaya melarikan diri dan mengunci dirinya di tandas dan membersihkan dirinya. Selepas itu, SP15 menyambung menggosok pakaian. Apabila dia memijak sesuatu yang melekit di dalam bilik itu dan menyangka ianya adalah air mani perayu, dia turun ke tingkat bawah untuk mendapatkan mop untuk membersihkan kawasan yang terjejas dan kemudian mengambil mop itu kembali untuk mencucinya. Pada masa itu, SD2 telah pulang ke rumah tetapi SP15 tidak memberitahunya mengenai kejadian itu. Pada hari berikutnya, SP15 menelefon Kedutaan Indonesia (dari talian selain di rumah perayu) dan memberitahu pegawai di sana ('SP3') mengenai kejadian serangan seksual itu. Dia dinasihatkan supaya membuat laporan polis atau datang ke Kedutaan. SP15 berkata beliau meninggalkan rumah itu dan mendapat bantuan pengunggang motorsikal yang berdekatan ('SP16') untuk menghantarnya ke balai polis untuk membuat laporan. Selepas itu, dia pergi ke hospital di mana dua doktor — SP5 dan SP6 — menjalankan pemeriksaan dan mendapati bahawa dia mempunyai koyakan baru di selaput dara dan kecederaan di kemaluannya, namun tiada lebam atau kecederaan lain di badannya. Siasatan polis tidak menemui sebarang air mani atau DNA milik perayu pada pakaian SP15 atau barangan lain yang dirampas polis dari rumah perayu untuk siasatan. Ketika perbicaraan, perayu berhujah bahawa tuduhan rogol itu dibuat oleh SP15 supaya dia boleh kembali ke Indonesia kerana tidak selesa bekerja untuk keluarganya. Perayu juga mendakwa bahawa pada setiap masa material, beliau tidak pernah bersendirian dengan SP15 di dalam rumah kerana rakannya (SP22) sedang melawatnya pada masa itu. Untuk mengesahkan keterangannya, perayu bergantung kepada keterangan SD2 serta pernyataan kepada polis yang diberikan di bawah s 112 Kanun Tatacara Jenayah ('KTJ') selepas penangkapannya. Hakim perbicaraan tidak mempercayai perayu, menolak pembelaannya sebagai penafian dan memutuskan bahawa SP15 adalah saksi yang boleh dipercayai dan memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan munasabah. Hakim mendapati bahawa berdasarkan rakaman CCTV yang diambil dari rumah pengawal di kawasan itu menunjukkan bahawa SP22 telah meninggalkan rumah perayu sebelum SD2

keluar untuk membeli makan malam dan oleh itu perayu mempunyai peluang untuk merogol SP15. Salah satu hujahan perayu dalam rayuan ini terhadap sabitan dan hukuman tersebut adalah keputusan hakim perbicaraan yang menggunakan s 265A KTJ yang membenarkan SP15 dan SP16 memberi keterangan pada perbicaraan dari belakang skrin, di luar pandangan perayu dan peguamnya, untuk melindungi identiti mereka. Perayu berhujah bahawa prosedur itu adalah tidak perlu kerana dia mengenali SP15 dan tiada bukti yang menunjukkan bahawa nyawa SP15 dan SP16 akan terancam sekiranya identiti mereka didedahkan. Perayu berhujah bahawa prosedur itu, sebaliknya, menafikan perbicaraan yang adil kerana peguamnya tidak dapat meneliti perlakuan SP15 dan SP16 ketika mereka memberi keterangan dan hal ini telah menghalang peguambela untuk memeriksa balas mereka dengan berkesan.

Diputuskan, dengan majoriti, menolak rayuan terhadap sabitan, dan mengurangkan hukuman pemenjaraan perayu kepada lapan tahun penjara:

(1) (**oleh Azman Abdullah HMR, majoriti**) Penggunaan s 265A KTJ untuk SP15 dan SP16 adalah menurut kuasa budi bicara hakim perbicaraan dan mahkamah ini mendapati bahawa hakim perbicaraam tidak salah menggunakan seksyen tersebut. Walaupun perlakuan saksi ketika memberi keterangan adalah penting untuk menilai kredibilitinya, ianya adalah tugas mahkamah, dan bukan litigan, untuk membuat penilaian kredibiliti saksi. Hujahan perayu bahawa s 265A adalah tidak berperlembagaan adalah soalan yang hanya sesuai didengar di hadapan Mahkamah Persekutuan berdasarkan perkara 128(2) Perlembagaan Persekutuan. Perayu sepatutnya menurut prosedur yang betul agar isu tersebut dirujuk ke Mahkamah Persekutuan untuk penentuannya (lihat perenggan 19 & 21).

(2) (**oleh Azman Abdullah HMR, majoriti**) Hakim perbicaraan tidak terkhilaf ketika memutuskan bahawa SP15 adalah saksi yang boleh dipercayai. Setelah mendengar dan mempertimbangkan semua keterangan yang dikemukakan ketika perbicaraan dan mempunyai kelebihan audio-visual untuk mendengar dan memerhatikan perlakuan saksi, hakim perbicaraan jelas mempunyai kuasa untuk membuat penemuan mengenai kredibiliti saksi. Mahkamah rayuan seharusnya tidak mengganggu penemuan tersebut melainkan sekiranya ditunjukkan bahawa mereka terkhilaf dan tidak meneliti semua keterangan yang ada. Dalam kes ini, tiada sebab untuk mengganggu penemuan hakim perbicaraan tersebut (lihat perenggan 22).

(3) (**oleh Azman Abdullah HMR, majoriti**) Walaupun terdapat kekurangan dan terdapat beberapa keterangan SP15 yang tidak konsisten, tiada sebab untuk dia membuat cerita palsu. Keterangan perubatan daripada SP5 dan SP6 menyokong keterangan SP15 dan tiada percanggahan material dalam keterangannya untuk memaksa

mahkamah menerima versi perayu. Rakaman CCTV menunjukkan SP22 telah keluar dari Meru Desa Park sebelum SD2 keluar dari kawasan perumahan itu pada pukul 8.48.37pm. dan pulang pada pukul 9.01.18pm. Oleh itu, perayu bersendirian dengan PW15 di dalam rumah itu selama lebih kurang 13 minit di mana terdapat kemungkinan kejadian rogol itu berlaku. Sekiranya tiada sebarang bukti bahawa rumah itu dipecah masuk atau SP15 telah melakukan hubungan seks dengan lelaki lain, terdapat kesimpulan yang tidak dapat dielakkan bahawa terdapat koyakan baru di selaput dara SP15 dan kecederaan di kemaluannya yang disebabkan oleh perayu (lihat perenggan 23–25).

(4) (**oleh Azman Abdullah HMR, majoriti**) Mahkamah ini tidak dapat bersetuju dengan perayu bahawa siasatan polis terhadap kes itu adalah lemah dan tidak lengkap. Siasatan telah dilakukan dengan terperinci dan perayu tidak diprejudiskan. Perkara-perkara yang dibangkitkan oleh perayu tidak menjamin campur tangan rayuan (lihat perenggan 26 & 28).

(5) (**oleh Azman Abdullah HMR, majoriti**) Walaupun hakim perbicaraan dalam alasan penghakimannya tidak menyebut pernyataan beramaran perayu kepada polis mengenai penangkapannya, hakim telah meneliti kandungan pernyataan beramaran tersebut. Mahkamah juga mendapati bahawa pernyataan beramaran tersebut, pembelaan semasa kes pendakwaan, kenyataan saksi dan keterangan perayu di peringkat pembelaan, semuanya mengandungi naratif yang sama. Oleh itu, tidak boleh dikatakan bahawa kegagalan hakim perbicaraan untuk menyebut mengenai pernyataan beramaran di dalam alasan penghakimannya adalah serius dan membatalkan sabitan perayu kerana pernyataan beramaran tersebut tidak menambah sebarang keterangan perayu di mahkamah. Alasan penghakiman Mahkamah Tinggi jelas menunjukkan bahawa hakim perbicaraan telah mempertimbangkan semua pembelaan perayu termasuk fakta-fakta yang disebut di dalam pernyataan beramarannya (lihat perenggan 31 & 33).

(6) (**oleh Azman Abdullah HMR, majoriti**) Hakim perbicaraan mendapati pihak pembelaan mempunyai fikiran terkemudian kerana kegagalan peguam bela untuk meletakkan kesnya kepada SP22 ketika pemeriksaan balas terhadapnya. Walaupun perayu telah menyatakan versi peristiwanya pada peringkat awal iaitu di dalam pernyataan beramaran. Namun, untuk membuktikan bahawa dia bersama SP22 pada masa kesalahan itu, fakta tersebut seharusnya diletakkan kepada SP22 supaya SP22 dapat mengesahkannya. Pihak pembelaan juga didapati gagal membuktikan dakwaan perayu bahawa pertuduhan terhadapnya adalah hasil konspirasi antara SP15, SP16 dan musuh-musuh politiknya. Hakim perbicaraan tidak terkhilaf apabila mendapati bahawa pembelaan perayu adalah penafian kosong (lihat perenggan 34–36).

(7) (**oleh SM Komathy HMR, menentang**) Seorang tertuduh dalam perbicaraan jenayah berhak berhadapan dengan pengadu untuk mencabar keterangannya melalui pemeriksaan balas. Peluang melihat wajah saksi adalah faktor terpenting dalam pemeriksaan balas. Oleh itu, budi bicara mahkamah di bawah 265A KTJ untuk membenarkan seorang saksi memberi keterangan secara tersembunyi untuk melindungi identitinya demi keselamatannya perlu dilaksanakan dengan berhati-hati bagi memastikan perbicaraan yang adil. Perintah perlindungan saksi hanya perlu dibuat di mana pra-syarat yang dinyatakan dalam s 265A dipenuhi (lihat perenggan 67).

(8) (**oleh SM Komathy HMR, menentang**) Dalam kes ini, hakim perbicaraan terkhilaf dalam menggunakan s 265A KTJ yang mana keperluan peruntukan tersebut tidak dipenuhi. Fakta bahawa seorang saksi enggan memberi keterangan dan enggan identitinya didedahkan adalah tidak mencukupi secara ipso facto untuk perintah perlindungan dibuat. Harus ada keterangan yang boleh dipercayai bahawa keengganan untuk memberi keterangan adalah berdasarkan ketakutan yang berasas, nyata dan tulen yang mewajarkan identiti mangsa dilindungi untuk melindungi keselamatannya. Tiada bukti bahawa SP15 mempunyai sebab untuk takut akan keselamatannya kerana dia pada masa material dalam penjagaan dan penjagaan perlindungan Kedutaan Indonesia. Tiada sebarang bukti yang menunjukkan bahawa perayu atau seseorang bagi pihaknya telah mengugut SP15 dalam apa cara sekalipun. Lebih lagi, identitinya sudah diketahui oleh perayu. Malah bagi SP16, dia bukanlah saksi material kerana apa yang dilakukan hanyalah membawa SP15 ke balai polis. Sukar untuk memahami mengapa perintah perlindungan diperlukan di dalam kes ini. Berdasarkan itu, sabitan perayu harus dibatalkan (lihat perenggan 69–71 & 72).

(9) (**oleh SM Komathy HMR, menentang**) Terdapat beberapa keterangan SP15 yang tidak konsisten dan bercanggah secara material yang menyebabkan keterangannya jauh daripada 'luar biasa meyakinkan', seperti yang diteliti oleh hakim perbicaraan. Keterangannya sahaja, tanpa bukti sokongan lanjut tidak mencukupi untuk mewajarkan sabitan: (a) kelakuannya sejurus selepas dakwaan kejadian rogol itu tidak menyerupai perlakuan mangsa rogol yang tulen. Setelah membersihkan dirinya di bilik mandi, dia kembali menggosok baju. Untuk membersihkan apa yang difikirkannya adalah air mani perayu di lantai bilik tidur, dia turun ke tingkat bawah dua kali — sekali, untuk mendapatkan mop — mengetahui bahawa perayu boleh berada di tingkat bawah dan mungkin akan merogolnya lagi. Tingkah lakunya yang mencurigakan, terutamanya ketika memadamkan bukti hubungan seksual, seolah-olah tiada apa yang berlaku, sukar untuk difahami. Seseorang akan menjangkakan dia akan mengalami trauma dan dalam keadaan terkejut atau tertekan. Sebaliknya, dia meneruskan kerja

rumahnya dengan tenang, terkawal dan di luar kebiasaan; (b) dakwaan SP15 bahawa perayu adalah agresif dan memegang tangannya secara paksa apabila dia merogolnya tidak konsisten dengan keterangan perubatan, yang tidak menunjukkan sebarang kecederaan pada tubuhnya; (c) setelah menerima panggilan telefon daripada SP15, SP3 membuat laporan polis di mana dia menyatakan bahawa SP15 telah mengadu 'diganggu secara seksual' oleh majikannya. Pada hari yang sama, saksi dari agensi pembantu rumah, SP12, membuat laporan polis mengatakan bahawa Kedutaan Indonesia telah memaklumkan kepadanya bahawa SP15 telah mengadu 'tidak dilayan adil' oleh majikannya. SP15 tidak pernah memberikan penjelasan untuk kedua-dua keterangan kontemporari ini yang tidak konsisten dengan dakwaan kejadian rogol itu; (d) SP15 mendakwa dia menghubungi Kedutaan Indonesia dari rumah perayu. Namun, nombor talian tetap (05–5497131) yang mana SP3 menerima panggilan itu bukanlah nombor telefon rumah perayu. Mengapa SP15 tidak bercakap benar mengenai isu seperti ini? Adakah terdapat perkara tersembunyi di sebalik kejadian ini? Pihak pendakwaan boleh mengesan dengan mudah identiti pemilik nombor talian tetap itu; (e) ketiadaan air mani perayu dan DNA di semua barangan yang dirampas oleh polis tidak konsisten dengan naratif SP15. Saksi forensik, SP14, bersetuju dengan pemeriksaan balas bahawa walaupun mop telah dibasuh, kesan air mani masih boleh kekal pada mop tersebut; (f) adalah mustahil bahawa perayu begitu terdesak dan terburu-buru untuk merogol SP15 dengan mengetahui bahawa isteri dan anaknya boleh pulang ke rumah pada bila-bila masa dari kedai makanan segera yang terletak hanya sepuluh hingga 13 minit dari rumah itu. Yang lebih penting, mengetahui bahawa terdapat kemungkinan besar SP15 melaporkan kejadian itu kepada isterinya (lihat perenggan 82–87).

(10) (**oleh SM Komathy HMR, menentang**) Tidak boleh dikatakan bahawa keterangan perubatan koyakan baru dalam selaput dara SP15 dan kecederaan di kemaluannya menyokong dakwaan rogol. Pegawai-pegawai perubatan (SP5 dan SP6) yang memeriksa SP15 bersetuju dengan pemeriksaan balas bahawa kecederaan itu juga konsisten dengan seks secara sukarela dan beronani. Perbuatan onani dengan jari juga boleh menyebabkan koyakan pada selaput dara selain hubungan seksual. Kedua-dua SP5 dan SP6 tidak dapat menunjukkan bahawa koyakan dan kecederaan di selaput dara adalah kerana kemasukan zakar (lihat perenggan 89).

(11) (**oleh SM Komathy HMR, menentang**) Walaupun menurut s 159 Akta Keterangan 1950, aduan SP15 kepada SP3 dan kepada SP16 dan laporan polisnya secara teknikal menyokong keterangannya, namun mereka tidak disokong oleh keterangan bebas menurut *Baskerville* (iaitu, seperti yang dijelaskan di dalam kes *R v Baskerville* [1916] 2 KB 658) kerana semua aduan itu berasal dari SP15 sendiri. Aduannya kepada SP3 dan

SP16 serta laporan polis itu mempunyai keraguan tidak mempunyai nilai keterangan yang lemah. Sekiranya keterangan SP15 tidak meyakinkan, fakta yang sering diulangi tidak dapat menambah berat pembuktiannya. Malah, ketika peluang pertama, aduan SP15 bukanlah mengenai rogol tetapi gangguan seksual dan tidak dilayan dengan baik oleh majikannya (lihat perenggan 92–93).

(12) (**oleh SM Komathy HMR, menentang**) Hakim perbicaraan terkhilaf apabila mendapati keterangan SP15 'luar biasa meyakinkan' dan terdapat keterangan yang kukuh. Percanggahan dalam keterangan SP15 menimbulkan beberapa keraguan serius mengenai kebenaran tuduhan SP15 dan menimbulkan keraguan munasabah dalam kes pendakwaan (lihat perenggan 95–96).

(13) (**oleh SM Komathy HMR, menentang**) Berdasarkan keputusan mahkamah ini dalam kes *PPrasit Punyang v Public Prosecutor* [2014] 4 MLJ 282 (yang dikekalkan oleh Mahkamah Persekutuan) dan keputusan Mahkamah Persekutuan baru-baru ini mengenai semakan dalam kes *Sathya Vello v Public Prosecutor* [2022] 4 MLJ 111, kegagalan mahkamah perbicaraan untuk mempertimbangkan pernyataan beramaran perayu, walaupun konsisten dengan keterangannya di mahkamah, adalah pelanggaran serius s 182A KTJ yang tidak dapat dipulihkan oleh s 92 Akta Mahkamah Kehakiman 1964 (lihat perenggan 102–105).

(14) (**oleh SM Komathy HMR, menentang**) Fakta bahawa perayu bersendirian dengan SP15 di rumah itu tidak bermakna dia telah merogolnya. Ini adalah kes yang berpunca daripada dakwaan SP15 terhadap perayu dan versi kedua yang menimbulkan keraguan yang besar mengenai dakwaan kejadian rogol itu. Oleh itu, sabitan perayu adalah tidak selamat dan tidak memuaskan. Oleh itu, kedua-dua sabitan dan hukuman harus diketepikan (lihat perenggan 106–107).]

Cases referred to

Aizz Amidie bin Aziz dan lain-lain lwn Pendakwa Raya [2021] 10 MLJ 142; [2021] 4 CLJ 496, HC (refd)
Ah Mee v PP [1967] 1 MLJ 220, FC (refd)
R v Baskerville [1916] 2 KB 658 (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293; [2015] 2 CLJ 145, FC (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265, FC (folld)
Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)
PP v Emran bin Nasir [1987] 1 MLJ 166; [1986] 1 LNS 69 (refd)
PP v Mardai [1950] 1 MLJ 33 (refd)
Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan [2014] 1 MLJ 363; [2013] 8 CLJ 359, CA (refd)
Prasit Punyang v PP [2014] 4 MLJ 282, CA (refd)

A *R v Davis* [2008] UKHL 36, HL (refd)
Sathya Vello v PP [2022] 4 MLJ 111, FC (folld)
Shahrullah bin Abdul Rakeb v PP [2012] 4 MLJ 592, CA (refd)

Legislation referred to

B Courts of Judicature Act 1964 s 92
Criminal Procedure Code ss 112, 182A, 265A, 265A(2), (3)
Evidence Act 1950 s 159
Federal Constitution art 128(2)
Penal Code s 376, 376(b)
C Witness Protection Act 2009

Appeal from: *Pendakwa Raya lwn Yong Choo Kiong* [2023] 7 MLJ 744 (High Court, Ipoh)

D *Hisyam Teh Poh Teik (with Rajpal Singh, Salim Bashir, Tiew Poh Nee, Low Wei Lon and Hannah Kam) (Hisyam Teh & Co); (Rajpal, Firah & Vishnu) for the appellant.*
Mohd Amril bin Johari (with Mohd Fuad bin Abdul Aziz) (Attorney General's Chambers) for the respondent.

E

Azman Abdullah JCA (delivering majority decision of the court):

INTRODUCTION

F **[1]** This appeal is against the decision of the High Court dated 27 July 2022 whereby the High Court had convicted the appellant/accused for an offence of rape of his domestic helper ('the victim') under s 376 of the Penal Code. The appellant was sentenced to 13 years of imprisonment and two strokes of the cane. The appellant now appeals on conviction and sentence.

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[2] We had, by majority decision, dismissed the appeal on conviction and allowed the appeal on sentence. We now provide our reasons for the decision.

THE PROSECUTION'S CASE

H

[3] In short, the facts of the prosecution's case are that, the appellant who is state assemblyman for the constituency of Tronoh, Perak and a member of the executive council of the Perak State Government had been accused for rape of his 23 year old Indonesian maid. The victim testified that the appellant had
I non-consensual sex with her.

[4] According to the victim, the offence occurred on 7 July 2019 whereby the appellant had raped the victim when there was no one at home. The appellant's wife, DW2, was said to left the house with her son Bryce in her

Vellfire BVY 8858 to buy McDonald's at a drive through outlet that was about ten minutes away from their home. In her testimony, the victim stated that the incident happened around 8pm when she was upstairs ironing clothes. The appellant came into the room and closed the curtains before he pulled the victim's hand towards the bed and knocked her down. The victim tried to escape, but failed. The appellant continued forcibly held both victim's hands and took off her pants and panties before inserted his penis into her vagina for two to three minutes. The victim managed to run away when the appellant let go of her hands. She went into the toilet. The appellant followed her into the toilet and tried to kiss her but she managed to push him out and lock the door.

[5] When the victim continued with ironing after the incident, she was stepped on something sticky which she believed was the appellant's semen. So, she went down and brought a mop and cleaned it. She then took the mop down to wash it. At that time, she noticed a McDonald's box in the dustbin.

[6] On 8 July 2021, the next day, the victim had asked the driver for appellant, SP7, to take SP15 to the embassy. However, SP7 refused as he needs to apply for leave. At around 10am, the victim then called the Indonesian embassy and spoke to PW3. According to PW3, the victim informed her that she had been sexually abused by her employer. PW3 advised the victim to lodge a police report or find her way to the embassy. The victim then left the appellant's house and was helped by a motorist ('PW16') who took her to the police station.

[7] The victim was taken to a hospital where she was first examined by PW6 and later by a gynaecologist, PW5. They found a freshly torn hymen and an abrasion on her vagina. PW5's opinion was that this was a recent penetrative injury by something which passed through the hymen and that injury was consistent with sexual intercourse. Apart from that, no any bruises or injuries found on the bodies of PW15, as confirmed by PW6.

[8] During the investigation, the police took possession of the clothes worn by the victim for DNA analysis and seized some items that were allegedly used during the rape. However, from the analysis, no semen or DNA of the appellant was found on the clothes, vagina and fingernails of the victim or on the other items seized.

[9] There was also evidence of CCTV footage from the Meru Desa guardhouse and also McDonalds. However, according to the police officer, PW19, there were discrepancies as regard the timing used in the CCTV systems in both places and the actual time ie the CCTV recording at the Meru Desa guardhouse was ten minutes fast and seven minutes slow at McDonalds.

A THE DEFENCE CASE

[10] The appellant elected to give evidence in which he denied the charge made against him. As submitted by the defence, the crux of the appellant's defence was as follows:

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(a) he did not rape PW15 at all on 7 July 2019 around 8.15pm until 9.15pm;

(b) the appellant was not left alone with PW15 on 7 July 2019 around 8.15pm until 9.15pm;

C

(c) he was together with PW22 and had a chat after they came back from Kuala Lumpur;

(d) when his wife, DW2, went out with their son to the McDonalds, PW22 was still at the appellant's house;

D

(e) PW22 was still there when the wife came back from the McDonalds;

(f) PW22 only left the appellant's house around 9pm;

(g) the appellant was still wearing the same clothes after coming back from Kuala Lumpur, ie a black or dark blue T-shirt and a pair of long trousers. Later, he went to have a shower and changed; and

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(h) at 9.30pm, he had sexual intercourse with DW2 at that night and they fell asleep after that. This was informed to PW23 by DW2 in a WhatsApp message and her cautioned statement.

F

[11] The appellant alleged that the victim had fabricated the rape in order to return to Indonesia because she was unhappy working for the family and that there was collusion between the victim and PW16 to falsely frame him. In support of his defence, the appellant relied on his s 112 statement ('D17') that was given to the police soon after his arrest. It was exculpatory in nature.

G

[12] The appellant's evidence was corroborated by the testimony of DW2 who said that she was sure PW22 was still around when she returned from McDonald's as she could hear their talking. According to DW2 also, she saw the victim after coming back from McDonald's and the victim looked normal and was doing her duties as usual.

H

THE TRIAL JUDGE'S DECISION

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[13] The trial judge accepted the victim's testimony and convicted the appellant on the charge of rape. The elements of rape under s 376(b) of the Penal Code was held satisfied that the appellant had sexual intercourse with the victim and such intercourse was without her consent.

[14] The learned trial judge referred to the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293; [2015] 2 CLJ 145 in which it was held that 'the corroboration is normally required in a sexual offence as a matter of practice and prudence, not of law'. Therefore, in arriving at his decision, the learned trial judge had examined the evidences before him, ie the medical evidence and the Meru Desa CCTV footage. The learned trial judge also found that the victim is credible witness. He found that the footage showed that the appellant had the opportunity to rape the victim when he was alone for the duration of about ten to 13 minutes at the time DW2 left for McDonalds.

[15] On the other hand, the learned trial judge had rejected the appellant's defence on the reason that such defence was an afterthought and bare denial. The learned trial judge also held that DW2 was an interested witness.

GROUNDS OF APPEAL

[16] Before us, the appeal was argued mainly on the following grounds:

(a) the learned trial judge erred in invoking s 265A of the CPC;

(b) the learned trial judge erred in accepted the evidence of PW15 as credible and corroborated;

(c) the learned trial judge erred when he did not direct his mind as to the investigations of PW23 that was shoddy and incomplete; and

(d) the learned trial judge erred when he failed to consider the appellant's defence.

OUR DECISION

Issue (a): The learned trial judge erred in invoking s 265A of the CPC

[17] It was the submission of the appellant that the appellant's right to a fair trial has been compromised due to the misdirection committed by the learned trial judge in invoking s 265A of the CPC to allow SP15 and SP16 to give their evidence anonymously. It was argued that there is completely no necessity for s 265A of the CPC to be invoked in the instant case to enable SP15 and SP16 to give their evidence in anonymity. In consequence of the wrongful invocation of s 265A of the CPC for SP15 and SP16, the appellant's right to effectively cross-examine SP15 and SP16 had been unjustly diminished and/or hampered as neither himself nor his counsel has been able to form a complete observation of their demeanour in order to assess their credibility while they were giving evidence.

[18] It is first apposite that s 265A of the CPC be stated in its entirety as follows:

> 265A Special provisions relating to protected witness
>
> (1) Notwithstanding section 264, where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.
>
> (2) For the purpose of satisfying itself as to the need to protect the identity of the witness, the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.
>
> (3) If after such inquiry the Court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given in such a manner that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.
>
> (4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.
>
> (5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.
>
> (6) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person and his counsel.
>
> (7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section.

[19] We have considered this matter and we are of the view that the invocation of s 265A of the CPC is the discretionary power of the learned trial judge. It is true that a witness's demeanour is important in assessing his or her credibility as decided in the of *Shahrullah bin Abdul Rakeb v Public Prosecutor* [2012] 4 MLJ 592 (which was cited by the appellant). But we have to remember, it is the duty of the court to evaluate on the credibility of the witness and not upon litigant. Therefore, for this appeal, we find that the learned trial judge is not erred when he invoked s 265A of the CPC for SP15 and SP16.

[20] We could not comment further on this as we have no grounds as to why the learned trial judge allow such invocation but we believe that all matters have

been considered. What we have only the decision of the learned trial judge in the notes of proceeding (refer to Appeal Record Vol 2 in encl 6 at p 108, PDF) which stated as follows:

> Hasil siasatan atau inkuiri yang dijalankan pada 10 Jun 2021, saya berpendapat adanya keperluan untuk identiti kedua-dua saksi terlindung ini dilindungi sebagaimana kehendak s 20(1)(a) dan (b) Akta Perlindungan 2009 dan s 265A Kanun Acara Jenayah.

[21] On the constitutionality issue of s 265A of the CPC whereby the appellant prayed to this court for a declaration that s 265A of the CPC is unconstitutional, this issue was never raised in the High Court. In this regard, we are guided by the decision of Federal Court in the case of *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 which held that 'it is plainly obvious that the legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the Constitution'. It has to be noted that by virtue of art 128(2) of the Federal Constitution, it confers jurisdiction on the Federal Court to determine a question as to the effect of any provision of the Constitution. Therefore, in any proceedings before another court, whenever a question arises as to the effect of any provision of the Constitution, it is the Federal Court which shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination. The appellant should follow the proper procedure for such issue to be referred for the determination of the Federal Court. With that, *ergo cadit quaestio*.

Issue (b): The learned trial judge erred in accepted the evidence of PW15 as credible and corroborated

[22] We are of the considered opinion that the learned trial judge had not erred in his finding that PW15 is a credible witness. There has been clear finding of facts made by the learned trial judge based on the hearing of the witnesses and considering all the evidences tendered. We are of the view that the learned trial judge is the one who had the audio and visual advantage to observe the demeanour of the witnesses. Hence, he was clearly entitled to make findings with regard to the credibility of the witnesses. As an appellate court, we should be slow to interfere with such findings unless it can be shown before us that the findings were perverse and against all available evidence. In the present case, we see no reason to disturb the finding of the learned trial judge.

[23] Even though there are several shortfalls and inconsistencies in the victim's evidence, we both still find that no reasons for PW15 to make up her stories. Moreover, in his finding, the learned trial judge had not only considered the evidence of PW15 but also other corroborative evidences in

which we both also found that there was abundant of evidences from the victim herself and corroborated evidence in the form of medical report by SP5 and SP6.

[24] It is true that when there are two sets of evidence which contrary with each other on a fundamental matter, the material contradiction and discrepancies or omissions must be construed in favour of the accused. However, in this present appeal, we both find no material contradiction for us to accept the appellant's version.

[25] Same as what had been stated by the appellant, the victim, PW15 also said that DW2 had left the house with her son to go to the McDonalds. According to the victim, the rape happened after DW2 left the house. This facts was denied by the appellant in which he said that he was with PW22 until DW2 came back from the McDonald. However, from the finding of the learned trial judge, through a footage from the CCTV, it shows that PW22's vehicle exits Meru Desa Park at 8.37.50pm while DW2's vehicle only exits Meru Desa Park at 8.48.37pm and returned at 9.01.18pm Therefore, there is about 13 minute that both the appellant and the victim were left alone at the house. Within such time, it is possible that rape may happened to the victim. Besides, no other evidence from the appellant stated that his house was broken into or the victim had sexual intercourse with other man. Therefore, it is an evitable conclusion that a freshly torn hymen and an abrasion on the victim's vagina was caused by the appellant as alleged by the victim.

Issue (c): The learned trial judge erred when he did not direct his mind as to the investigations of PW23 that was shoddy and incomplete

[26] We now turn to consider the investigations of PW23 as it was contended by the counsel that the appellant's right to a fair trial was compromised as a result of the investigating officer's failure to investigate the appellant's version of facts and to carry out a thorough investigation.

[27] The counsel for the appellant submitted that the investigating officer failed to investigate to whom the number 05–5497131 was registered when the victim contacted the embassy and the conduct of PW23 to seize the bedsheet on which the victim alleged she was raped for DNA analysis.

[28] However, we are unable to agree with the appellant that the investigation was shoddy and incomplete. We are satisfied that the investigation here was satisfactory and the appellant was not prejudiced. The points raised was not material to warrant our appellate interference.

Issue (d): The learned trial judge erred when he failed to consider the appellant's defence

[29] The appellant raised two points under this heading. First, the trial judge had breached s 182A of the CPC in failing to consider the appellant's statements which was made under s 112 of the CPC. Second, the trial judge made a grave mistake in coming to his conclusion that the appellant's defence was an afterthought and a bare denial as it was consistent with his s 112 statement and was amply corroborated by Mr Lee and DW2.

[30] It is not in dispute that the trial judge made no mention of it at all in his grounds of judgment. According to the counsel of the appellant, this constitutes a breach of s 182A and this is a serious error warranting appellate intervention and cited numerous authorities in support of this proposition.

[31] We have considered this matter and we agree with the learned deputy public prosecutor that although the learned trial judge made no mention to the appellant's cautioned statement, however, he had pointed out all the substance contained in that cautioned statement and had analyse them. This can be seen throughout his ground of judgment which we ourselves also find that the appellant's cautioned statement (exh D17), the defence during the prosecution's case, the witness statement (exh PSSD1) and the appellant's evidence at the defence stage are all the same in which they highlight the same narratives. Thus, it cannot be said that the failure of the learned trial judge to mention to the appellant's cautioned statement was fatal in the event that such cautioned statement added nothing further to the appellant's evidence that was given in court. It is our considered opinion that such failure also did not vitiate the conviction.

[32] We are guided by a decision of the Federal Court in *Sathya Vello v Public Prosecutor* [2022] 4 MLJ 111 which held as follows:

> *There was no merit to the appellant's contention that the trial judge had failed to consider all the evidence in breach of s 182A of the CPC. Although the trial judge had not considered the appellant's cautioned statement, it was in substance similar to the appellant's evidence in court. Hence, the mere omission to refer to the cautioned statement in the judgment was not fatal and did not vitiate the conviction as the cautioned statement added nothing further to the accused's evidence in court*. The cautioned statement was a self-serving exculpatory statement which the appellant regurgitated at the trial by way of evidence under oath but which evidence the trial judge rejected for lacking in credibility. As for the complaint that DW2's evidence was not considered, it was not such a serious omission as to vitiate the appellant's conviction. The court failed to see how DW2's evidence that she had lodged a police report against Ganesan and Nanthini and had provided the police with their photographs and telephone numbers could have cast a reasonable doubt on the prosecution's case that the large amount of drugs that were in the appellant's

possession was for the purpose of trafficking (see paras 108, 111–112 & 116–117).

[33] From the grounds of judgment by the learned trial judge, it is clear that he had considered the appellant's defences prior before he made the finding of prima facie case at the end of the prosecution's case. We find that the learned trial judge not only considered the facts that are mentioned in the appellant's cautioned statement ie he did not rape the victim, he was with his wife DW2 and PW22 was also present at the house, but also the new defence put forward ie no DNA of the appellant found and the abrasion was caused by the victim's own action (masturbation).

[34] We now turn to the appellant's submission that the learned trial judge was wrong in holding that the appellant's defence was an afterthought and bare denial. We find from the grounds of judgment by the learned trial judge that when he made finding that the defence was afterthought, he did consider all evidences before him. The learned trial judge found that the defence was afterthought because of the failure of defence counsel to put its case through cross-examination of PW22. It is true that the appellant had stated his version of events at a very early stage ie in his cautioned statement, but to prove his defence that he was with PW22 at the time the offence was alleged to be committed, such facts should be asked to PW22, so that PW22 can confirmed that.

[35] The defence that was found to be afterthought by the learned trial judge was on the allegation by the appellant that there was a political manoeuvre designed to bring the appellant's down by his political enemies. Thus, the appellant contended that there was a conspiracy between SP15, SP16 and his political enemies. The defence was based on the police report made by YB Dato Ngeh Koo Ham who said that SP16 who took SP15 to the police station was pointed at a gun and given money amounting to RM100,000. However, this contention was denied by SP16. SP16 has testified that no one had pointed a gun or gave monies to him.

[36] Therefore, we find that the learned trial judge had not erred in his finding that the appellant's defence was afterthought and bare denial since all the evidence had been scrutinised.

CONCLUSION

[37] Based on the aforesaid reasons, we find no merit in the appellant's appeal on conviction. The conviction was safe and the decision of the High Court is affirmed. We dismiss the appeal on conviction. Appeal on conviction is dismissed by majority.

[38] With regard to the appellant's appeal on sentence, in the circumstances of the case and having regard to the sentencing trends, we unanimously allow the appeal on sentence. We reduce the terms of imprisonment from 13 years to eight years with two strokes of the cane.

SM Komathy JCA (delivering dissenting judgment of the court):

INTRODUCTION

[39] The appellant was convicted of an offence of rape of his domestic helper ('the victim') under s 376 of the Penal Code and sentenced to 13 years imprisonment and two strokes of the cane in the High Court on the following charge:

> Bahawa kamu pada 7 Julai 2019 di antara jam lebih kurang 8.15 malam hingga 9.15 malam, di dalam sebuah bilik di tingkat atas dalam rumah No 52, Jalan Desa Meru 2, Mern Desa Park, Bandar Meru Raya, 30020 Ipoh, di dalam Daerah Kinta, di dalam Negeri Perak telah melakukan rogol terhadap Awang (No Pasport: AU359249) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 376(1) Kanun Keseksaan.

[40] He has appealed against his conviction and sentence. The majority of this court has decided to dismiss the present appeal by the appellant against his conviction. I find myself unable to agree with the majority view. These are the reasons for my dissent.

THE PROSECUTION'S CASE

[41] The appellant is a state assemblyman for the constituency of Tronoh, Perak and a member of the executive council of the Perak State Government. He is married to DW2 and they have four children, daughters Celine and Eunice and sons Brian and Byrce. In 2019, the family lived in a five bedroom double-storey house in Meru Desa Park, Ipoh, a gated community that had a guardhouse equipped with CCTV.

[42] The victim is a 23 year old Indonesian maid. She began her employment with the appellant's family as a domestic helper in May 2019.

[43] On the morning of 7 July 2019, the appellant and DW2 made a day trip to Kuala Lumpur to send off daughter Eunice who was studying there. They were driven to Kuala Lumpur by one Mr Lee, a family friend ('PW22') in his Toyota Alphard bearing the car plate number PLV 8383. Bryce, the youngest child, stayed home with the victim. They returned to the appellant's home in Ipoh sometime after 8pm that day. Mr Lee did not leave straightway but stayed on to have a chat with the appellant for some time in the backyard of the house.

A At some point thereafter, DW2 left the house with Bryce in her Vellfire BVY 8858 to buy dinner at McDonald's at a drive through outlet that was about ten minutes away from their home. The victim behaved normally when DW2 returned, and DW2 did not notice anything amiss. The victim continued with her chores.

B

[44] It was the case for the prosecution that Mr Lee had left the house before DW2 left for McDonald's and that the appellant had raped the victim during this time when there was no one at home.

C

[45] The next morning at around 11am, the victim telephoned the Indonesian embassy and spoke to PW3. The victim had called the embassy in Kuala Lumpur from a landline 05–5497131. This was not the phone number of the appellant's home. According to PW3, the victim informed her that she had been sexually abused by her employer and that she advised the victim to D lodge a police report or find her way to the embassy. The victim then packed her clothes and left the employer's house and waved down a motorist ('PW16') who took her to the police station in Ipoh to lodge a report.

E **[46]** The victim was taken to hospital where she was first examined by PW6 and later by a gynaecologist, PW5. They found a freshly torn hymen and an abrasion on her private part. PW5's opinion was that this was a recent penetrative injury by something which passed through the hymen and that injury was consistent with sexual intercourse. Significantly, there were no F bruises or injuries on the victim's body.

[47] The police took possession of the clothes worn by the victim for DNA analysis. They also seized some items that were allegedly used during the rape from the appellant's house. No semen or DNA of the appellant was found on G the clothes, vagina and fingernails of the victim or on the other items seized from the appellant's home in the course of investigations.

[48] Police officer, PW19 took possession of CCTV footage from the Meru Desa guardhouse and also McDonalds. PW19 explained that there were H discrepancies as regard the timing used in the CCTV systems in both places and the actual time. According to him, the CCTV recording at the Meru Desa guardhouse was ten minutes fast and seven minutes slow at McDonalds. It was plainly obvious from the Meru Desa CCTV footage that Mr Lee had indeed left the house before DW2 went to McDonald's.

I

THE VICTIM'S TESTIMONY

[49] The victim's testimony was as follows. Around 8pm she was upstairs ironing clothes in Brian's room when DW2 came to inquire if she had eaten.

Soon after DW2 had left, the appellant came to the room holding the pants that he had worn to Kuala Lumpur. The appellant closed the curtains and pulled her towards the bed and then knocked her down and tried to be on top of her, she tried to escape, but was unsuccessful. The appellant held both her hands forcibly and then with one hand took off her pants and panties and inserted his penis into her vagina. He was in her for two to three minutes. When the appellant let go of her hands, she ran away by pushing him and went into the toilet. He followed her into the toilet and tried to kiss her but she managed to push him out and lock the door. The appellant knocked on the door several times and then left.

[50] Continuing with her testimony, the victim stated that after calming down and washing her vagina, she came out of the toilet to continue ironing but stepped on something sticky on the floor which she believed was the appellant's semen. She went down and brought a mop and cleaned it, and then took the mop down to wash it. At this time, she saw Bryce washing his hands after having had his dinner. She noticed a McDonald's box in the dustbin.

[51] Under cross-examination, she maintained the appellant had non-consensual sex with her and that she was sure that there was penile penetration as she 'sudah nikah' at the time.

THE DEFENCE CASE

[52] The appellant elected to give evidence. He denied the charge made against him. The appellant contended that he did not commit the offence because he was never alone with the victim on the night of the alleged rape. According to him, Mr Lee left around 9pm. He then went into the house and saw DW2 and son having their dinner in the kitchen. The appellant stated that he was then still wearing the same clothes he had worn to Kuala Lumpur, ie a black or blue t-shirt and a pair of long trousers.

[53] The appellant testified that he then went up to have his shower and changed. At 9.30pm he made love to his wife and they went to sleep. The appellant alleged that the victim had fabricated the rape in order to return to Indonesia because she was unhappy working for the family and that there was collusion between the victim and the motorist PW16 to falsely frame him. In support of his defence, the appellant relied on his s 112 statement (D17) that was given to the police soon after his arrest. It was exculpatory in nature.

[54] The appellant's evidence was corroborated by the testimony of DW2 who said that she was sure Mr Lee was still around when she returned from McDonald's as she could hear him and the appellant talking. DW2 stated that

she saw the victim after coming back from McDonald's and the latter looked normal and was doing her duties as usual.

THE TRIAL JUDGE'S DECISION

[55] The trial judge accepted the victim's testimony and convicted the appellant on the charge of rape. He determined that the medical evidence and the Meru Desa CCTV footage supported the victim's version of events and rejected the appellant's defence. He found the victim be a credible witness and that she had remained cogent and firm in all material aspects of her story throughout rigorous cross-examination by the defence counsel. He found her evidence to be unusually convincing as to overcome any doubts that might arise from the lack of corroboration.

[56] By way of contrast, the trial judge had serious doubts about the credibility of the appellant and DW2 and found their evidence demolished by the CCTV footage. He found that the footage showed that the appellant had the opportunity to rape the victim as he was alone with the victim for about ten to 13 minutes when DW2 and Bryce left for McDonalds. He further found that the appellant's allegation of rape was a ploy to return home could not be believed as the evidence showed that the victim had no reason to be unhappy as she was treated well by the family and was even allowed to use the house phone to call her mother.

GROUNDS OF APPEAL

[57] Before us, the appeal was argued on four main grounds:

(a) the appellant was prejudiced by the wrong invocation of s 265A of the CPC by the trial judge;

(b) the trial judge failed to judicially appreciate or evaluate the evidence of the victim;

(c) that the trial judge failed to appreciate that the investigations of PW23 was shoddy and incomplete; and

(d) the trial judge failed to give due consideration to the defence of the appellant.

[58] I will deal with these issues seriatim.

Ground 1: Protection order under s 265A of the CPC

[59] The first ground of appeal has to do with the validity of a witness protection order granted by the trial judge on 23 June 2021 pursuant to s 265A

of the CPC. This requires a little narration. On the application of the prosecution, the trial judge had conducted an inquiry on 10 June 2021 as required by ss (2) and (3) of s 265A. Following the inquiry, he granted the protection order to allow the victim and PW16 to give their evidence in anonymity. PW16 was the witness who gave the victim a lift to the police station the day following the alleged rape. As a consequence of the order, both the victim and PW16 gave evidence from behind a screen under the cover of anonymity and the appellant and his counsel were unable to see their faces.

[60] It is submitted by counsel for the appellant that the granting of the protection order was wrong in law and contrary to principle as the trial failed to consider the following facts before granting the order:

(a) that the issue of anonymity does not arise because the identity of the victim was already known to the appellant as at the material time she was working as a maid for the appellant's family;

(b) that the identity of PW16 was also disclosed by the prosecution in open court as 'Hanif bin Mohamad Wahab' when they sought protection under the Witness Protection Act 2009; and

(c) that there was no evidence adduced that the victim and PW16 were at the material time under a genuine fear for their safety if their identity was revealed.

[61] It is further argued that the trial has been rendered unfair by the erroneous invocation of s 265A by the trial judge which had unjustly curtailed the appellant's counsel's right to cross-examine his accuser and PW16 effectively by observing their demeanour and by looking at their faces. It is submitted that as there is a strong connection between the ability to see the face of a witness and a fair trial, it is essential that any protection order granted must first fulfil the prerequisites of s 265A. In support of this submission, counsel relied on decisions from United Kingdom, Australia and Canada. It would suffice to refer to one of them.

[62] This is the decision of the House of Lords in *R v Davis* [2008] UKHL 36. The appellant had been convicted of murdering two men by shooting them at a party. He was identified as the murderer by three witnesses who had been permitted to give evidence anonymously, from behind screens, because they had refused, out of fear, to testify should their identities be disclosed. It was submitted on behalf of the appellant that this procedure was contrary both to the common law right of a defendant to be confronted by his accusers and art 6(3)(d) of the European Convention on Human Rights. Both limbs of this argument were accepted unanimously by the House and it quashed the appellant's conviction for murder and remitted his case back to the Court of Appeal, to decide whether to order a retrial. Lord Carswell explained:

I agree with the view expressed by the Court of Appeal ... that court would regard it as acceptable to allow a conviction to be based on the testimony of a witness given in the circumstances of the present case, if that were the sole or decisive evidence against the accused. That concept of the sole or decisive evidence has been regularly repeated in the jurisprudence of the court, I consider that the principle is more universal and that it could and should be applied to the anonymising of evidence in criminal trials in this jurisdiction.

It is possible to distil some propositions from this review: (a) there is a presumption in favour of open justice and confrontation of a defendant by his accuser; (b) it is possible in principle to allow departures from the basic rule of open justice to some extent, but a clear case of necessity should be made out; (c) the court should be sufficiently satisfied that the witness's reluctance to give evidence in the ordinary manner is genuine and that the extent of his or her fear justifies a degree of anonymity; (d) anonymising expedients may include the withholding of the witness's name and address, screening of the witness from the defendant and the public, screening from the defendant's legal advisers, disguising of the witness's voice from the defendant and the public and disguising of the voice from the legal advisers; (e) the more of these expedients the court might consider adopting, the stronger the case must be for invading the principle of open justice. Determination of the question depends upon balancing to ensure that the trial continues to be fair; and (f) an important consideration is the relative importance of the witness's testimony in the prosecution case. If it constitutes the sole or decisive evidence against the defendant, anonymising which prevents or unduly hinders the defendant and his advisers from taking steps to undermine the credit of the witness is most likely to operate unfairly ... Courts trying criminal cases should not be over ready to resort to such measures, and I would commend to them the words of the Court of Appeal (in the context of reading statements) in *R v Arnold* [2004] EWCA Crim 1293, para 30 cited in *Regina v Sellick and another* [2005] 1 WLR 3257, 3277, para 55:

> We cannot leave this case without sounding a word of caution. The reference in *Luca v Italy* to the not infrequent occurrence of the phenomenon of frightened witnesses being unwilling to give evidence in trials concerning mafia type organisations is echoed across a wider range of serious crime in this country. Counsel both confirmed that this problem was becoming commonplace and the experience of the members of this court concerned with the conduct of criminal trials is likewise. Inevitably, applications under s 23 will follow but this judgment should not be read as a licence for prosecutors. Very great care must be taken in each and every case to ensure that attention is paid to the letter and spirit of the Convention and judges should not easily be persuaded that it is in the interests of justice to permit evidence to be read. Where that witness provides the sole or determinative evidence against the accused, permitting it to be read may well, depending on the circumstances, jeopardise infringing the defendant's art 6(3)(d) rights; even where it is not the only evidence, care must be taken to ensure that the ultimate aim of each and every trial, namely, a fair hearing, is achieved.

[63] In response, the learned deputy public prosecutor denied that the appellant was deprived of justice and a fair trial as the victim and PW16 had been present at the trial to give their evidence and the appellant was given the right to cross-examine them. It is his submission that the fact that the appellant and his counsel were unable to see the victim did not infringe on the appellant's right to a fair trial as s 265A permits it where a witness is reluctant to testify in court for fear of his or her safety. The learned deputy denied that the protection order had undermined the fairness of the trial as the trial judge was able to see the faces of the two witnesses to assess their credibility.

Whether trial judge was correct in granting the protection order

[64] I turn now to consider the rival submissions. It will be helpful, if I set out s 265A in its entirety:

265A Special provisions relating to protected witness

(1) Notwithstanding section 264, where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.

(2) For the purpose of satisfying itself as to the need to protect the identity of the witness, the Court shall hold an inquiry in camera by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.

(3) If after such inquiry the Court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given in such a manner that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognized, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.

(4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.

(5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.

(6) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person and his counsel.

(7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section.

[65] Section 265A of the CPC enables the prosecution to apply to the court for a protection order where a witness seeks anonymity and refuses to testify in court for fear of his or her safety if his identity is revealed. See *Aizz Amidie bin Aziz dan lain-lain lwn Pendakwa Raya* [2021] 10 MLJ 142; [2021] 4 CLJ 496. In order to ascertain the legislative purpose behind s 265A, it will be useful to consider the parliamentary debate when the provision of was debated in Parliament. The then de facto Law Minister had stated (as recorded in the Hansard dated 17 May 2016):

> Fasal 7 bertujuan untuk memasukkan seksyen baru 265A, 265B dan 265C. Seksyen baru ini mengadakan peruntukan bagi keterangan saksi yang dilindungi diambil melalui tatacara khas. Pindaan ini dicadangkan bagi menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbang keselamatan dirinya jika identitinya didedahkan terutamanya dalam kes-kes yang melibatkan kumpulan jenayah terancang. Dengan peruntukan baru yang dicadangkan itu akan lebih ramai saksi berani untuk tampil memberikan keterangan terhadap apa-apa pertuduhan di mahkamah termasuklah terhadap anggota kumpulan jenayah terancang dan dengan keterangan itu, maka sabitan dapat dikenakan terhadap mereka yang melakukan jenayah.

[66] This same is repeated in the explanatory note to the CPC (Amendment) Bill 2016:

> Fasal 7 bertujuan untuk memasukkan seksyen baru 265A, 265B dan 265C ke dalam Akta 593. Seksyen baru itu mengadakan peruntukan bagi keterangan saksi yang dilindung diambil melalui tatacara khas. Pindaan ini dicadangkan bagi menangani masalah keengganan saksi untuk memberi keterangan di mahkamah kerana bimbangkan keselamatan dirinya jika identitinya didedahkan.

[67] It is clear from the foregoing passages that s 265A was introduced to give the court the discretionary power to permit witnesses to give evidence anonymously in order to conceal their identities for their safety where this is considered necessary in the interests of justice especially in cases involving organized crime. An accused person in a criminal trial is entitled to confront his accuser in order that he may cross-examine them and challenge their evidence. Being able to see the face of a witness is the most important factor in cross examination. As such, in my view, this discretion ought to be very sparingly exercised and with great caution to ensure that a fair hearing is achieved. It follows that a protection order ought to be made only where the preconditions set out in s 265A have been met. A protection order in favour of an undercover agent would be appropriate as this may be necessary for his own and his family's protection and others because of genuine fear on the part of the witness of retaliation by or on behalf of the accused.

[68] The preconditions under s 265A that must be met before the jurisdiction to make a witness protection or anonymity order arises are:

(a) that the order is necessary to protect the safety of the witness; and

(b) and is necessary to make the order in the interests of justice by reason of the fact that it appears to the court that (a) it is important that the witness should testify, and (b) and the witness's refusal to give evidence is based on a genuine fear and the witness would not testify if the order were not made.

[69] In my judgment, that the mere fact a witness refuses to testify and is reluctant to have his identity disclosed in the proceedings are ipso facto not sufficient to make this order. There must be credible evidence that shows that the witness's refusal to give evidence is based on a well founded, real and a genuine fear which justifies the identity of the victim to be protected from disclosure to protect his or her safety.

[70] Coming back to the instant case, I am not persuaded that a clear case of necessity was made out. There is no evidence that the victim had reason to fear that her safety was in jeopardy, since she was at the material time in the care and protective custody of the Indonesian embassy. Neither was there any evidence adduced that the appellant or someone on his behalf had threatened or approached her in any way. Moreover, and crucially, her identity was already known to the appellant. As such, there was no basis for a protection order on the ground that the identity of the victim needed to remain anonymous in order to be protected from disclosure for her safety.

[71] As for PW16, clearly, he was not even a material witness in the prosecution's narrative as all that he did was to drive the victim to the police station when she told him of the rape. That being so, it is difficult to fathom why a protection order was necessary in his case. There was evidence led by the prosecution fact that a DAP politician had made a police report that PW16 had driven the victim to the police station as PW16 had been threatened by someone at gun point and was paid RM100,000. PW16 had lodged a report denying all the allegations in the aforesaid report. In my view, the report by the DAP politician does not constitute a reasonable ground for PW16 to fear that his safety was in danger.

[72] For these reasons, I accept the appellant's submission that the trial judge was in error when he invoked s 265A of the CPC to grant the protection order when the statutory prerequisites and the necessity for the order had not been made out. In the result, I am inclined to quash the appellant's conviction for rape.

[73] In the event, I am wrong on this issue, I proceed to address the remaining three grounds raised by the appellant to challenge his conviction.

Ground 2: Appreciation of victim's evidence

[74] The next ground of appeal deals with the victim's credibility. The trial judge as mentioned earlier had found the victim's evidence to be unusually convincing and was supported by the medical evidence, and the testimonies of PW3 and PW16.

[75] This is essentially an appeal against the findings of fact made by the trial judge. He was entrusted with the task of evaluating the conflicting evidence of the victim and the appellant in respect of the alleged incident of rape. In this instance, his findings of fact were largely based on his assessment of the credibility of the respective witnesses. At the conclusion of the trial, he accepted the evidence of the victim and rejected the defence's version of events.

[76] Given that this appeal largely involves the evaluation of the trial judge's finding of facts below, it is apposite that we remind ourselves of an appellate court's role with respect to the finding of facts made in the course of a trial. The appellate court's power of review with respect to finding of facts is limited because the trial judge is generally better placed to assess the veracity and credibility of witnesses, especially where oral evidence is concerned. However, this rule is not immutable. Where it can be established that the trial judge's assessment is plainly wrong or against the weight of the evidence, the appellate court can and should overturn any such finding. In so doing, the appellate court will evaluate the cogency of the evidence given by the witnesses by testing it against inherent probabilities or against uncontroverted facts.

[77] Particularly, in sexual offence cases, experience has shown that people who allege that they have been raped, sometimes, and for various reasons, create false stories. Such allegations are easy to make and frequently very difficult to refute even by a person who is entirely innocent. See *Pendakwa Raya lwn Mohamad Malek Ridhzuan bin Che Hassan* [2014] 1 MLJ 363; [2013] 8 CLJ 359 and *Public Prosecutor v Emran bin Nasir* [1987] 1 MLJ 166; [1986] 1 LNS 69.

[78] In *Public Prosecutor v Mardai* [1950] 1 MLJ 33, Spenser Wilkinson J, expressed the view that in cases of sexual offences, it is unsafe to convict where there is no independent evidence. He said at p 33:

> Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant must be corroborated; nevertheless, it appears to me, as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant's story. It would be sufficient, in my view, if that corroboration consisted only of a subsequent complaint by the complainant herself provided that

the statement implicated the accused and was made at the first reasonable opportunity after the commission of the offence.

[79] The trial judge in the instant case found the victim to be unusually convincing as she was unshaken in cross-examination. He further found that in any event, her evidence was corroborated by the medical evidence and that of PW3 and PW16.

[80] It is the contention of the appellant's counsel that the trial judge accorded excessive weight to the victim's evidence and wrongly accepted her evidence as credible and compelling. It is said he failed to consider that there were material contradictions and inconsistencies in her evidence. Counsel submitted that in view of the discrepancies and contradictions, the trial judge should not have accepted any part of the victim's evidence unless there was corroboration from independent and extrinsic sources.

[81] In response, the learned deputy submitted that there was no basis to disturb the findings of fact made by the trial judge that the victim was unusually convincing. The victim had no reason to falsely implicate the appellant unless the incident had occurred. He further argued that the fact that the appellant's semen was not found in the victim's private part or anywhere else for that matter and the victim had no bruises or injuries on her body does not necessarily mean that the rape did not take place. The medical evidence indicated penetration to the vagina by a blunt object which must have been the appellant's penis. The deputy further submitted that the victim's failure to inform DW2 and the appellant's driver of the rape should not be held against her as it is not inherently improbable that the victim would have felt that their loyalty was to the appellant and they would not have believed her.

[82] Having scrutinised the victim's evidence, I find several material inconsistencies and discrepancies on several issues. First, the victim's behaviour immediately after the alleged rape bore no resemblance to the conduct of a genuine rape victim. According to her, after she had cleaned herself in the bathroom, she wanted to continue with the ironing but stepped on something which she thought was semen on the floor of the bedroom. Knowing that the appellant could be downstairs, and could rape her again, she went downstairs to take the mop to clean the floor and then took the mop down again to wash it. Her suspiciously calm conduct especially in erasing the evidence of sexual intercourse as if nothing had happened was difficult to fathom. One would expect her to be traumatised and in a state of shock or in distress after the rape, and not continue with her household chores in a cool, collected and indifferent manner.

[83] Second, the victim's allegation that the appellant was aggressive and had forcefully held her hands when he raped her, was not consistent with the medical evidence, which did not show any injuries on the body. One would expect to find some injuries on her body if her account was true.

[84] Next, and crucially there are two pieces of contemporaneous evidence that are inconsistent with the victim's allegation of rape. The first is the evidence that PW3 had made a report (P9) after the victim had phoned her. In this police report, PW3 clearly stated that the victim had only complained of sexual harassment by her employer. The second piece is the evidence of PW12 (the witness from the maid agency) who had lodged a report (P10) the same day to the effect that he was contacted by the Indonesian embassy that the victim had complained that 'dia telah diberi layanan yang tidak adil daripada majikannya'. The allegation took a wholly different complexion and morphed into rape and only surfaced several hours later that day when the victim was taken to the police station by PW16. There was no explanation proffered for the two totally inconsistent versions given by the victim. There is a world of difference between sexual harassment, not being well treated by the employer and rape by the employer. One would expect a rape victim to allege rape in no uncertain terms.

[85] Thirdly, the victim alleged she had called PW3 from the appellant's house to report the rape after getting the embassy number from the telephone book, but PW3 testified the call had come from a landline 05–5497131, which was not the appellant's house telephone number. The victim claimed she did not know anyone at the time to seek help. It begs the question where did the victim call from and why was she not telling the truth on an issue like this. Or are there hidden or unseen hands behind this episode. The prosecution could have easily traced the identity of the owner of the landline number.

[86] Fourthly, the absence of the appellant's semen and the appellant's DNA appears on any of the items that was seized, including the mop was not consistent with the victim's version of the facts. The forensic witness PW14 under cross-examination accepted that that even if the mop had been washed, semen stains could still remain on the mop.

[87] Lastly, the victim alleged that the appellant had taken the opportunity to rape when DW2 had gone to McDonalds and there was no one at home. I find it incredulous that the appellant would have been so desperate and reckless to run the huge risk of being caught for raping the victim by committing the alleged offence knowing that his wife and son could return home at any time from McDonald's especially since McDonalds was only ten to 13 minutes drive

away from his home. And, more importantly, knowing there was a high likelihood that the victim would report the rape to DW2 on seeing her and cry to her for help.

[88] On the whole, it is clear to me that there are several shortfalls and inconsistencies in the victim's evidence. With respect to the learned judge, I am far from satisfied that the victim's evidence is unusually convincing. There are glaring inconsistencies in the victim's evidence, some more material than others. As such her testimony alone was not sufficient, without further corroborative evidence implicating the appellant to ground a conviction.

[89] I turn now to consider the corroborative evidence that the trial judge had relied on to call for the defence. First, the medical evidence. The trial judge was satisfied that the medical evidence corroborated the victim's allegation of rape. It is true that the medical evidence showed a fresh tear in her hymen and an abrasion, but this ipso facto, does not indicate that the victim was raped. PW5 and PW6, the doctors who examined the victim, agreed under cross examination that there were other possible causes like masturbation or self-pleasure with the finger, for the tear in the victim's hymen besides sexual intercourse, ie that injuries were also consistent with consensual sex and masturbation. Both PW5 and PW6 could not conclusively testify that the tear and abrasion were because of penile penetration. That being so, it could not be said that the medical evidence afforded corroboration of the victim's story of a sexual assault.

[90] Next, I turn to consider the victims complaints to PW3 and PW16. The trial judge held that her complaints to them was corroboration of the victim's evidence. Section 159 of the Evidence Act states:

> In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[91] Section 159 allows as corroboration any former statements made by a witness to buttress the witness's credibility by showing that his or testimony in court is consistent with his or her previous statement. It is instructive in this regard to refer to the judgment of the Federal Court in *Ah Mee v Public Prosecutor* [1967] 1 MLJ 220 wherein Ong Hock Thye FCJ explained:

> With respect, corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence: see *Clynes* (1960) 44 Cr App R 158 161. Consistency is not such corroboration and s 157 of the Evidence Ordinance should be read in the light of my exegesis thereof in the case of *Mohamed Ali* [1962] MLJ 230, 231, which I quote:

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> It will not be out of place here to say a few words about s 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R Baskerville* [1916] 2 KB 658. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' as it appears in s 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.

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[92] I accept that by reason of s 159 of the Evidence Act, the victim's complaint to PW3 and PW16 and the lodging of the police report are technically corroboration of the victim's evidence. However, it is clear from *Ah Mee v PP* that these are not corroboration by independent evidence as all complaints had originated from the victim. In my view, if the victim's evidence is not unusually convincing, it is difficult to fathom how the fact that the victim had repeated it several times can add much weight to it. It is imperative to note that at the first opportunity the victim had not complained of rape but of sexual harassment and of not being treated well by her employer.

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[93] In my view, her complaints to PW3 and PW16 and the lodging of the police report is suspect and have little additional evidential value. Corroboration by virtue of s 159 alone is not corroboration by independent evidence. In the present case, it is noteworthy that there is absolutely no *Baskerville* type of corroboration, ie that the corroborating evidence must be independent and must conform in a material particular that the accused, committed the offence.

G

[94] The learned trial judge held that he was persuaded that the victim was unusually convincing as she was unshaken in cross-examination. It is instructive in this regard to refer to the case of *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257, where the Federal Court explained:

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> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

I

[95] In my judgment, the discrepancies within the victim's testimony, as well as the contradictions raised several serious doubts as to the veracity of the allegation made by her. In finding her to be unusually convincing the trial judge resolved almost every ambiguity in the evidence in the victim's favour and ignored the glaring inconsistencies and discrepancies in her evidence. The contradictions in her evidence would have sufficed to create a reasonable doubt in the case for the prosecution.

[96] I therefore conclude that the trial judge erred in finding that the victim was unusually convincing and there was corroboration of her evidence.

Ground 3: Shoddy investigation

[97] Next, it is the appellant's contention that there was no proper investigation done by the investigating officer and he has been prejudiced by the same. I find this complaint to be without substance.

Ground 4: Evaluation of the defence evidence

[98] The trial judge did not accept the appellant defence that he had no opportunity to rape the victim as he found that Mr Lim had left the appellant's home before DW2 left for McDonald's. He made this finding based on the CCTV footage. He further found the defence of the appellant to be an afterthought and a bare denial.

[99] The appellant raised two points under this heading. First, the trial judge had breached s 182A of the CPC in failing to consider the appellant's s 112 statement to the police. Second, the trial judge made a grave mistake in coming to his conclusion that the appellant's defence was an afterthought and a bare denial as it was consistent with his s 112 statement and was amply corroborated by Mr Lee and DW2.

[100] As regards s 182A of the CPC, it is common ground that this section mandates the trial judge to consider all the evidence adduced before him in deciding whether the prosecution has proved its case beyond reasonable doubt. As stated earlier, the appellant had provided a s 112 statement to the police soon after his arrest which was consistent with his oral evidence in court. It is not in dispute that the trial judge made no mention of the appellant's s 112 statement at all in his grounds of judgment. Counsel contended that constitutes a breach of s 182A and this is a serious error warranting appellate intervention and cited numerous authorities in support of this proposition.

[101] In answer, the learned deputy submitted that although the trial judge had not considered the appellant's s 112 statement, he pointed out that it was

in substance similar to the appellant's evidence in court. Hence, the omission to refer to the s 112 statement in the judgment was not fatal and did not vitiate the conviction as the statement added nothing further to the appellant's evidence that was given in court. It was argued that the appellant was not prejudiced by the non-consideration of his s 112 statement.

[102] In my view, the prosecution's contention is contrary to the decision of this court in *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282 and a recent decision of the Federal Court on review in *Sathya Vello v Public Prosecutor* [2022] 4 MLJ 111. In both these cases, the cautioned statement of the accused was similar, if not identical to the oral evidence given in court. In *Prasit Punyang*, it was observed:

> In the context of the present case, the cautioned statement tendered by the appellant is one of the evidence which the learned JC should take into consideration in order to make a finding whether or not the prosecution has proved its case beyond reasonable doubt. ... The learned JC must consider carefully whether the cautioned statement is capable of raising a reasonable doubt on the prosecution case. The appellants cautioned statement was recorded a day after the arrest of the appellant. It is important, therefore, to point out that the appellant had mentioned the basic facts of his defence at a very early stage of the police investigation against him ... The impact of the totality of the cautioned statement on the prosecution case or innocence of the appellant has to be kept in mind in coming to the conclusion as to the guilt of the appellant. ... the learned JC had failed to adequately direct his mind as to the truth of the appellants version as stated the cautioned statement. ... We are of the view that at the conclusion of the trial, the learned JC should have properly addressed his mind in connection with the cautioned statement of the appellant in deciding whether the prosecution has proved its case beyond reasonable doubt ... The fact that the defence is not a recent fabrication is supported by the contents of the appellants cautioned statement which is substantively similar to his defence advanced ... It was then the duty of the learned JC to consider the defence of the appellant in the light of the cautioned statement that he had given to the police a day after he was arrested. On the facts of the present case, the failure on the part of the learned JC to consider and evaluate the appellants cautioned statement constituted a serious non-direction which amounts to a misdirection, warranting appellate intervention. Such a misdirection is an appealable error.

[103] The aforesaid decision was subsequently affirmed by the Federal Court.

[104] In *Sathya Vello v Public Prosecutor*, a similar complaint was taken by the defence that the trial judge had failed to consider the appellant's cautioned statement, and the appellant's sister's evidence. The Federal Court set aside the conviction on the ground that a breach of s 182A is fatal and cannot be cured by the proviso to s 92 of the Courts of Judicature Act. The *ex tempore* judgment is reproduced:

A long line of cases has established that the proviso to s 92(1) of the CJA is utilized with care and circumspection in rare cases. The majority of case law however does not support the legal position that the proviso may be utilized to circumvent a breach of s 182A of the CPC where such breach has occasioned a miscarriage of justice. This latter element will turn on the fact of each particular case. In the instant case, having examined the facts, we are of the unanimous view that the non-consideration of the accused cautioned statement and his sister's evidence has occasioned material prejudice resulting to miscarriage of justice. This is therefore not a fit case to apply proviso under s 92(1) of the CJA. Even if we invoke s 37(d) of the DDA, such that the sister's evidence is also considered, it is probable on a balance of evidence would have rebutted presumption of knowledge. Accordingly, we find merit on the appeal on the totality of the evidence, we find the conviction unsafe, we therefore allowed the appeal, we set aside the conviction and sentenced, the appellant is acquitted and discharged.

[105] In my view, the two cases discussed in the preceding paras illustrate that the failure to consider a s 112 statement made by an accused person, even if it is consistent and in accord with the appellant's oral testimony in court, is a serious breach under s 182A and cannot be cured by the proviso to s 92 of the Courts of Judicature Act.

[106] In view of the position I take on the failure of the trial judge to consider the appellant's s 112 statement, I do not find it is necessary to consider the defence complaint, that the trial judge was wrong in holding that the appellant's defence was an afterthought and bare denial, save and except to say that I accept the trial judge's finding that Mr Lee had left the appellant's home before DW2 left for McDonald's. This, however, does not mean that the appellant had raped the victim. This is a case that boiled down to the victim's word against the appellant's and the latter's version raises grave doubts about the victim's allegation of rape.

CONCLUSION

[107] For the reasons given, I am of the view that the appellant's conviction is unsafe and unsatisfactory. I am therefore minded to allow the appeal and set aside the conviction and sentence against the appellant.

Appeal against conviction dismissed; appeal against sentence allowed and appellant's jail term reduced to eight years.

Reported by Ashok Kumar